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No. 92-1057

In The

Supreme Court of the United States

October Term, 1992

IN RE: J. GREG SIKES,

Debtor.

J. GREG SIKES,

Petitioner,

vs.

BANCBOSTON MORTGAGE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

The claim in Petitioner's Statement of the Case that Sikes was simply a passive investor "whose sole role in the Montclair partnership consisted of obtaining letters of credit and executing a limited guaranty to the lender"

[1] Pursuant to Rule 29.1 of the Supreme Court Rules, Respondent discloses that it is a wholly owned subsidiary of the First National Bank of Boston, which is a wholly owned subsidiary of the Bank of Boston Corporation, a publicly owned corporation.

(Pet. 5), is not true. Sikes was in fact a knowledgeable general partner actively involved in partnership affairs, and thus entitled to nearly half the partnership's profits. Prior to becoming a general partner in Montclair, Ltd., Sikes had entered into several other financial dealings with Ledford as a joint venturer, general partner and/or limited partner. Trial Transcript ("TR") at 2-72.[2] He understood the difference in responsibilities and liabilities between a limited partner and a general partner; and he signed, as a general partner, not just letters of credit and a guaranty as alleged in the Petition, but all of the loan documents. *Id.* at 2-73, 74.

While Sikes' partner, Thomas E. Ledford ("Ledford"), was eliciting the fraudulent pre-sale contracts, Sikes would call him on a weekly or biweekly basis to monitor the condominium sales. TR at 2-82. Sikes and his personal financial manager had free access to all the records and personnel relating to the partnership. *Id.* at 2-83. Shortly after the required number of pre-sale contracts were submitted to BancBoston, Sikes inquired about the pre-sale contracts and Ledford told him about one contract where the purchaser had been granted a contingency. *Id.* at 2-75.

Thereafter, Sikes directed his financial manager to review documents relevant to the project and interview Ledford. *Id.* at 2-80. Sikes' financial manager met with Ledford to discuss, among other things, Ledford's success in meeting the "pre-sale" requirements, and Ledford informed him that, of the pre-sale contracts submitted to BancBoston, five had contingencies or "outs" and eleven did not. *Id.* at 2-77 and *see*

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[2] Referenced pages of the Trial Transcript are set forth in the Appendix beginning at App. 2.

typed notes of Sikes' financial manager's meeting with Ledford (handwritten copies admitted into evidence as Exhibit 25) (App. 17, 18). The financial manager told Sikes about the "outs" in the pre-sale contracts after his meeting with Ledford. TR at 2-77, 79. When his financial advisor told him about the "outs" Sikes knew that a condition precedent to disbursement of the loan proceeds was the submittal of *bona fide* pre-sale contracts. *Id.* at 2-75. Because Sikes executed the loan documents containing the conditions relating to the pre-sale requirements, and he was told about the "outs," he should have been aware of Ledford's fraud.

At the close of BancBoston's proof at trial, Sikes elected to move for dismissal, thereby relinquishing his right to offer evidence in the event the motion was granted. *See* FED. R. CIV. P. 41(b). The bankruptcy court granted Sikes' motion, ruling that because BancBoston had not proven clearly and convincingly that Sikes knew or should have known of Ledford's fraudulent conduct, Ledford's fraud could not be imputed to him. BancBoston timely filed its appeal to the district court. In Sikes' arguments on appeal, he did not request the case be remanded for a new trial in the event the bankruptcy court was reversed; he did not even suggest he had additional evidence to rebut BancBoston's proof on the elements of the nondischargeability complaint (in fact, Sikes adopted Ledford's arguments on the evidence in their entirety); and he did not raise the procedural due process issue he now attempts to raise before this Court.

The district court reversed the bankruptcy court and ruled that Ledford's fraud and the resulting debt to BancBoston could be imputed to Sikes under Section 523(a)(2)(A) of the Bankruptcy Code. Sikes appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the district court's opinion.

Sikes did not request a remand or raise a procedural due process issue until he filed his reply brief.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

Petitioner relies upon a conflict between the Eighth Circuit and the Sixth Circuit for his argument that the grant of certiorari is necessary. The apparent conflict between the Eighth Circuit and the Sixth Circuit on the issue presented, however, no longer has practical significance. Recent court decisions have rejected the Eighth Circuit's reasoning, demonstrating a determination to follow the binding pre-Code precedent established over a century ago in *Strang v. Bradner*, 114 U.S. 555 (1885). In *Strang*, the Court declared that the fraud of an authorized agent, without more, was grounds for the non-dischargeability of the principal's debt *relating to his agent's fraud*. This rule was followed unanimously up to passage of the Bankruptcy Code of 1978. And, in enacting Section 523(a)(2)(A) of the Bankruptcy Code of 1978, Congress expressed an intent to codify existing case law. The Eighth Circuit's opinion, which has not been adopted by any other Circuit Courts of Appeal, is in direct contravention of the rule set forth in *Strang* and, according to the legislative history of Section 523(a)(2)(A), the Bankruptcy Code of 1978.

Sikes asserts that he was denied his constitutional right to due process. However, Sikes elected to move for involuntary dismissal at the close of plaintiff's proof at trial, thereby foregoing his right, when the bankruptcy

court granted his motion, to go forward with evidence in opposition to Respondent's required showings under Section 523(a)(2)(A). Moreover, Sikes' procedural due process arguments are not properly before this Court because he failed to timely raise them in the courts below.

ARGUMENT

I. The Lower Court's Ruling Presents No Conflict With The Decisions Of This Court Or The Principles Of The Bankruptcy Code.

Petitioner claims the decision below is in conflict with Justice Harlan's opinion in *Neal v. Clark*, 95 U.S. 704, 709 (1877), and the longstanding principles and policies of federal bankruptcy law. The decision below is no more in conflict with *Neal* than was Justice Harlan's later opinion in *Strang v. Bradner*. *Neal* held that for a debt to be nondischargeable because it was created by fraud, the fraud had to be "actual fraud", as opposed to constructive fraud. *Strang*, following *Neal*, declared that a partner's "actual fraud" could be imputed to his co-partners to make a debt nondischargeable in bankruptcy even where the co-partner did not consent to his partner's fraudulent acts or had no knowledge or reason to have knowledge of these acts. Justice Harlan wrote in *Strang* as follows:

> Each partner was the agent and representative of the firm with reference to all business within the scope of the partnership. And if, in the conduct of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the jury of

> innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefore upon the ground that such misrepresentations were made without their knowledge. This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business.

Id. (citing several state cases and treatises on partnership law).

Prior to enactment of the Bankruptcy Code of 1978, federal case law construing the issue of imputed liability under Section 17(a)(2) of the Bankruptcy Act of 1898 (the "Act"), 11 U.S.C. § 35 (repealed 1978), unanimously followed the rule set forth in *Strang*. *See* discussion of pre-Code precedent in *In re Paolino*, 75 Bankr. 641, 647 (Bankr. E.D. Pa. 1987); *In re Walker*, 53 Bankr. 174 (Bankr. W.D. Mo. 1985) (*"Walker II"*); and *In re Gray*, 22 Bankr. 676 (Bankr. W.D. Wis. 1982). Additionally, prior to 1970, state courts had concurrent jurisdiction to determine the dischargeability of a debt under Section 17(a)(2). The state courts also unanimously held that fraud committed by an agent would render a debt nondischargeable as to a debtor-principal. *See, e.g., Griffin v. Bergeda*, 152 Tenn. 512, 279 S.W. 385 (1926). Respondent has found *no* pre-Code cases with contrary holdings.

The adoption of the Bankruptcy Code of 1978 did not change the *Strang* rule. Section 523(a)(2) of the Bankruptcy Code of 1978 is derived directly from Section

17(a)(2) of the Act. The legislative history of Section 523(a)(2)(A) notes that it was modified "only slightly" from former Section 17(a)(2). *The express intent of Congress was to codify existing case law construing Section 17(a)(2).* S. Rep. No. 95-989, 95th Cong., 2d Sess. 78; H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 364, *reprinted* in 1978 U.S. Code Cong. & Ad. News 5787, 5864, 6320. To the same effect, *see* 124 Cong. Rec. 3998 (1978) (statement of Rep. Edwards). The case law at the time Section 523(a)(2)(A) was enacted was absolutely clear: actual fraud committed by an agent (Ledford) would render the resulting debt nondischargeable as to the debtor-principal (Sikes).

Applying principles of statutory construction enunciated in *Pennsylvania Welfare Department v. Davenport,* 495 U.S. 552, 563 (1990) ("[W]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."), together with the legislative history of § 523(a)(2), which indicates no intent to alter the statutory interpretation of § 17(a)(2), mandates that courts today follow the binding pre-Code cases decided under § 17(a)(2) of the Act. The majority of courts have done just that. *See* citations in *In re Luce,* 960 F.2d 1277 (5th Cir. 1992); *In re Calhoun,* 131 Bankr. 757 (Bankr. D.C. 1991); and *Paolino,* 75 Bankr. at 647. In *Walker II,* the court stated:

> [T]he fraud of an authorized agent, without more, has continually been recognized as a ground of non-dischargeability, although it takes the knowledge or reckless disregard of the principal to deny the latter's discharge in bankruptcy.

53 Bankr. at 179.

That the rule set forth in *Strang* is still good law is also confirmed by the leading bankruptcy commentator. 3 King, *Collier on Bankruptcy* ¶ 523.08 at 523-57 (15th ed. 1992). *Accord In re Cecchini*, 780 F.2d 1440, 1444 (9th Cir. 1986) (fraudulent partner's knowledge *and intent* imputed to co-partner for purposes of determining dischargeability); *In re Scheuer*, 125 Bankr. 584 (Bankr. C.D. Cal. 1991); *In re Yates*, 118 Bankr. 427 (Bankr. D.S.C. 1990); *In re Powell*, 95 Bankr. 236 (Bankr. S.D. Fla. 1989), *aff'd*, 108 Bankr. 343 (S.D. Fla. 1989) and *Powell v. Bear, Stearnes & Co.*, 914 F.2d 268 (11th Cir. 1990); *In re Smith*, 98 Bankr. 423 (Bankr. C.D. Ill. 1989); *In re Figge*, 94 Bankr. 654 (Bankr. C.D. Cal. 1988), *aff'd*, 928 F.2d 1136 (9th Cir. 1991); *In re Paolino*, 75 Bankr. 641 (Bankr. E.D. Pa. 1987); *In re Beleau*, 35 Bankr. 259 (Bankr. D.R.I. 1983).

II. The Conflict With The Eighth Circuit No Longer Has Any Practical Significance.

The Petitioner relies primarily on *Walker v. Citizens State Bank of Maryville, Missouri*, 726 F.2d 452, 454 (8th Cir. 1984) (*"Walker I"*) for his proposition that certiorari should be granted. Such reliance is misplaced. The *Walker I* decision has been the subject of continued and sharp criticism, beginning with the bankruptcy court which heard the case on remand.[3] That court pointed out that the Eighth Circuit erred by applying the standard for a pre-Code total denial of discharge case to a case that dealt

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[3] For a critical discussion undermining the reasoning of *Walker I* and the few decisions which have followed it *see Calhoun*, 131 Bankr. at 761; *Paolino*, 75 Bankr. at 648-49; and *Walker II*, 53 Bankr. at 179-81.

only with the dischargeability *of a particular debt created by fraud. Walker II,* 53 Bankr. 174. *See also In re Luce,* 960 F.2d 1277. Such confusion is perhaps understandable when it is realized that the parties in *Walker I* mistakenly briefed the case as if it involved a total objection to discharge, rather than the dischargeability of a particular debt created by fraud. *See Walker II* at 180. Under the Code, fraud no longer bars a *discharge,* but a particular debt created by fraud continues to be *nondischargeable.*

The few troubled decisions following *Walker I* have failed to articulate a persuasive basis for disregarding binding pre-Code precedent and the legislative history of Section 523(a)(2)(A). Moreover, like *Walker I,* they fail to distinguish the different purposes and assumptions underlying the particular issues in objection to discharge versus nondischargeability of debt cases. *See* Kennedy, *The Discharge of Partnerships and Partners Under the Bankruptcy Code,* 38 Vand. L.Rev. 857, 896 (1985) (exceptions from *dischargeability* are not designed as much to effect the conduct of the bankrupt as they are to protect certain classes of creditors from the loss of their just claims).

Recent decisions reject the erroneous reasoning of *Walker I* and continue to apply the well-established rule that fraud can be imputed to a partner regardless of his knowledge or involvement for purposes of determining the dischargeability of a debt created by fraud under Section 523(a)(2)(A). When the recent cases are reviewed and it is seen that the district and circuit courts now correctly follow pre-Code precedent, Petitioner's claim of conflict and confusion collapses.

III. There Is No Constitutional Question.

Sikes asserts that he was denied his constitutional right to due process because he has not been able to present evidence which might have shown Respondent failed to prove any of the elements of Section 523(a)(2)(A). Sikes' contention at this late date that he can come forward with additional evidence is belied by the fact that in the courts below he adopted the evidentiary arguments of his partner Ledford *in toto*. *See* Sikes' Reply Brief before the Sixth Circuit at pages 5-6 where Sikes adopted Ledford's evidentiary arguments:

> In his principle brief, Sikes adopted the entire brief of Ledford, including that portion of the brief concerning reasonable reliance under Bankruptcy Code section 523(a)(2)(A). Pursuant to Rule 28 (i) of the Federal Rules of Appellate Procedure, Sikes also hereby adopts by this reference the entire reply brief of the defendant-appellant, Thomas E. Ledford.

Rather than taking the opportunity at trial to present his "evidence", Sikes elected to move for dismissal at the close of BancBoston's proof. By making this election, he voluntarily relinquished his right to come forward with evidence because his motion was granted. *See* FED. R. CIV. P. 41(b).

The first time Sikes raised his due process issue was in his reply brief before the Sixth Circuit Court of Appeals. Sikes' procedural due process arguments are therefore not properly before this Court because they were not to timely raised in the courts below. *See Hormel v. Helvering*, 312 U.S. 552 (1941); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), *on remand*, 538 F.2d 811 (general rule

is that a federal appellate court does not consider an issue not passed on below). This issue should not be heard for the first time before the United States Supreme Court. Simply stated, Petitioner has presented no constitutional question. Therefore, this Court's intervention is unnecessary.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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App. 1

No. 91-5594/5649

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: Thomas E. Ledford; J. Gregg Sikes
Debtors.

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Plaintiff-Appellee,

vs.

Thomas E. Ledford and J. Gregg Sikes,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

JOINT APPENDIX

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[p. 2-71] MOLTENI - RECROSS/SIKES - DIRECT

RECROSS EXAMINATION

BY MR. HANCOCK:

Q. What bank did you go to to get the LC?

A. First American.

Q. Did they require the usual financial statement information?

A. Yes.

Q. They required you to sign loan documents?

A. Yes.

Q. You made all the commitments that you would expect to make at the bank, did you not?

A. Right, yes.

MR. HANCOCK: No further questions, Your Honor.

THE COURT: You can step down, Mr. Molteni. Call your next witness.

MR. DAVIDSON: Your Honor, I call Dr. Gregg Sikes.

JAMES GREGORY SIKES, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. DAVIDSON:

Q. Dr. Sikes, what is your occupation?

A. I'm a physician.

Q. Where do you practice?

A. At 356 25th Avenue North.

Q. You are a, or you were a general partner with Tom Ledford [p. 2-72] in Montclair, Limited. Is that correct?

A. That's correct.

Q. Prior to becoming a general partner in Montclair, you had entered into other financial dealings with Mr. Ledford.

A. That's correct.

Q. All right. And you were a joint venturer with Mr. Ledford in Timberlake Apartments, is that right?

A. I was a joint venturer.

Q. And you were a joint venturer with Mr. Ledford in – is it 325 Union Street?

A. That's correct.

Q. And you were also a partner with Mr. Ledford in Belmont Plaza, Limited?

A. Mr. Ledford was one of the general partners. I was a limited partner.

Q. Were you also involved with Mr. Ledford in Whispering Hills, Limited?

A. No, I was not.

Q. That was a real estate investment that you had gotten into prior to Montclair.

A. Not with Mr. Ledford.

Q. Excuse me?

A. Not with Mr. Ledford.

Q. All right. It was a real estate investment partnership that you had gotten into prior to the Montclair?

[p. 2-73] A. I was a limited partner in it.

Q. What about the Sunset Wind Park apartment complex in Memphis?

A. I helped arrange financing for the initial effort.

Q. Were you in with Mr. Ledford? Were you a partner in that?

A. Only in the initial phases of financial arrangements.

Q. And you were also an investor with Mr. Ledford in Eagle Oil and Gas.

A. As a limited partner.

Q. That was as a limited partner. All right. Now at the time you joined as a general partner of Montclair, you understood, did you not, the difference between a limited partner and a general partner?

A. Yes, I did.

Q. All right. And you signed loan documents with the bank as a general partner.

A. I signed documents.

Q. You signed those documents as a general partner of Montclair, Limited, did you not?

A. I believe that to be correct.

Q. All right. And you also signed a letter of credit with First American Bank as a general partner of Montclair, Limited, did you not?

A. I signed a letter of credit with First American Bank.

[p. 2-74] Q. Is it your contention that you didn't sign it as a general partner of Montclair?

A. I assumed I signed that personally.

Q. All right. But with regard to the Montclair, Limited, you helped to get financing for the project?

A. That's correct.

Q. All right. And you engaged with discussions with Mr. Ledford from time to time about marketing the project.

A. Mr. Ledford and I talked about marketing the project.

Q. And about raising capital?

A. I'm not sure I understand what you're asking.

Q. You assisted Mr. Ledford in raising funds for the Montclair project.

A. I helped secure a letter of credit from First American Bank.

Q. And you signed a personal guarantee for the debt of Montclair, Limited as a general partner.

A. I believe that to be correct.

Q. All right. Now, in spite of the fact that you were a general partner, it's true, is it not, that you relied on Mr. Ledford for the day-to-day management of the Montclair project?

A. That's correct.

Q. All right. And with regard to these presale contracts, you were relying on Mr. Ledford to obtain those presale contracts.

[p. 2-75] A. That's correct.

Q. You were aware, were you not, sir, that construction funding was a condition of the bank providing construction funding was that a certain number of presale contracts be obtained.

A. At some point between 1986 and now I was aware.

Q. Before the presale contracts were signed and you signed the loan documents, you were aware that there was a need to get presale contracts.

A. I was aware at some point there was a contingency of presale contracts before construction funds would be advanced.

Q. All right. What I'm asking you is, isn't it true you were aware of that before any construction funds were advanced?

A. I think that's correct.

Q. All right. And you were represented by counsel at the time you signed these loan documents?

A. Yes, I was.

Q. All right. The law firm of Bouldt, Cummings. Is that right?

A. Yes.

Q. Now, during the Fall of 1986 before you hired Mr. Mifflin to be your financial adviser, you were aware at least of one contract that had a contingency to it, were you not? The Phillip Molteni contract?

A. Yes, I was.

[p. 2-76] Q. And that was in the Fall of 1986.

A. It was before I hired Mr. Mifflin in 1987.

Q. When did you hire Mr. Mifflin?

A. I think in February 1987.

Q. And is it the Phillip Molteni agreement that you were aware had a contingency to it?

A. I believe that's been my stated testimony.

Q. Who told you that Mr. Molteni had this contingency?

A. Someone at Ledford Properties.

Q. And didn't Mr. Ledford tell you that?

A. It may have been, but it could have also been George Tomlin.

Q. All right. Say it could have been Mr. Tomlin?

A. Or Mr. Molteni; someone at Ledford Properties.

Q. Then in the Fall of 1987 you hired Mr. Al Mifflin to oversee all of your financial affairs?

A. That's correct.

Q. And shortly after you hired Mr. Mifflin, he met with Mr. Ledford.

A. That's correct.

Q. All right. And one of the things that he met with Mr. Ledford to discuss was the Montclair project?

A. Correct.

Q. Mr. Mifflin reported back to you about the meeting he had with Mr. Ledford.

[p. 2-77] A. Correct.

Q. And did he not tell you, at that time in February 1987 that of the contracts obtained five had contingencies, or outs, and that 11 did not?

A. I think – I think it was a later date. It was after I retained Mr. Mifflin. He did secure information requested

from Mr. Ledford and in a subsequent meeting with me did relate to me there were four to five contracts that had contingency agreements.

Q. Dr. Sikes, let me hand you -- let me first ask you, you remember I took your deposition in this case -

A. Yes, I do.

Q. - on or about November 10, 1989.

A. Yes.

Q. All right. Let me refer you to Page 19 of that, or let me ask you, do you remember me asking you this question?

> "What was your knowledge, what contingency did Mr. Molteni's contract contain?" Answer, "Selling his personal residence." Question, "Was this Mr. Phillip Molteni?" Answer, "Yes." Question, "How did you become aware of that contingency?" Answer, "Through Mr. Ledford."

Does that refresh your recollection about who told you about the Phillip Molteni contract?

A. That obviously was my stated testimony at that time. My [p. 2-78] testimony today is, I believe that to be correct that day, but it may well have been someone else in the office. Most of my conversations were with Mr. Ledford, but not all of my conversations.

Q. All right. Well, do you believe your memory would be better back in November 1989 or as you sit here today?

A. That may have not been a full answer at that time, but not necessarily an incorrect answer. I'm just trying to give you an honest answer.

Q. So you were trying to give me an honest answer on –

A. Both times.

Q. – November 10, 1989, were you not? Were you withholding information from me at that time?

A. No, I was not.

Q. Now, when Mr. Mifflin told that five of these contracts had contingencies, you knew prior to that time that these funds, the construction funds, were being advanced on the basis of the bank having received valid presale contracts.

A. I knew they were based on receiving a certain number of contracts.

Q. All right. Then you were aware that those contracts were not to have contingencies unless authorized by the bank.

A. I'm not sure I was aware of that.

Q. Did there come a time when you were aware of that?

A. Yes; when you started taking my deposition.

[p. 2-79] Q. Did you inquire of Mr. Ledford whether these contingencies, as he reported to Mr. Mifflin in February of 1987, were in any way violative of the bank's loan agreements?

A. I had no reason to ask him that. The construction funds had already been advanced based on those contracts. My assumption at that time, I don't think unfounded, was if the bank advanced the funds, those contracts were okay. I had no basis to ask Mr. Ledford if there was anything wrong with those contracts.

Q. All right. So to make sure I understand this, sometime before you hired Mr. Mifflin you were aware that there was a contingency with Mr. Phillip Molteni.

A. That's correct.

Q. Then in February, Mr. Mifflin met with Mr. Ledford and shortly thereafter you became aware that at least five contracts had contingencies. Despite that knowledge, you had no discussion with Mr. Ledford about this – well did you ever have discussion with Mr. Ledford about it?

A. Yes, I'm sure myself and/or Mr. Mifflin did because our concern at that point is regarding the contracts and contingencies, our only concern was closing contracts because the more contracts we closed, the more monies we had to pay down our liabilities in a project that we were becoming concerned about.

Q. And you stood to obtain 40 percent of the profits from [p. 2-80] this project, did you not?

A. That's correct.

Q. And you had entered a contract with Mr. Mifflin where he received seven percent of whatever profits you received.

A. He received a percentage of what my income is.

Q. All right. So if your income was 40 percent for the Montclair project, he would have received seven percent of that?

A. I think our contract was he received no percentage of any pre-existing business arrangements prior to our contract. He would not have received any money from the Montclair.

Q. Was it your understanding that he would not get paid for any services he rendered with respect to the Montclair?

A. Not from money that came in from the Montclair; that's correct.

Q. How was he to be compensated for the work he did with respect –

A. From my medical practice and the income I made from it.

Q. Did you make available to Mr. Mifflin the loan documents?

A. I gave Mr. Mifflin any documents that I may have had, which were few, and I requested Mr. Ledford that Mr. Mifflin was representing me in all financial affairs and matters, and I asked that he please submit over any documents that he may have for Mr. Mifflin's review.

Q. All right. As far as you know, Mr. Mifflin did review [p. 2-81] those loan documents?

A. As far as I'm aware, he reviewed what he received.

MR. DAVIDSON: I have no further questions, Your Honor.

THE COURT: Cross examine. Mr. Jennings, do you want to start? I guess this is direct examination.

MR. JENNINGS: Briefly, Your Honor, at this stage.

CROSS EXAMINATION

BY MR. JENNINGS:

Q. Dr. Sikes, were you involved in raising any funds relative to this project other than the letter of credits that you've testified about?

A. No, I was not.

Q. Were you involved in obtaining any contracts?

A. No, I was not.

Q. All right. What funds, Dr. Sikes, did you receive from the acquisition loan or the construction loan during this period of time?

A. I never received any money from either one of those.

Q. Have you received any money to this point?

A. No, I have not.

Q. All right, sir. Now, what was your role in this project?

A. My role was only to help secure financing which in the front end, I believed was to help secure a letter of

credit to apply against the financing from Bank of Boston to – for a [p. 2-82] construction loan.

Q. Did you do anything other that?

A. That's all I did.

Q. All right. What involvement did you have with Mr. Ledford as far as knowing what was going on relative to the project?

A. I would call Mr. Ledford either on a weekly or every other week, basically, and ask for updates as to how the project was going, meaning both construction, how coch [sic] (phonetic) sales were going. Sometimes, as relates to Montclair only, sometimes in conversations I was updating some other business deals we had at the time.

Q. And to your recollection, how often to you talk to Mr. Ledford about the affairs that you were involved in with Mr. Ledford?

A. Sometimes it might be once or twice a week and sometimes it might be every other week, but certainly we would talk in a matter of several times a month.

Q. All right. Why did you eventually retain Mr. Mifflin?

A. Because my nonmedical financial relationships and investments were taking too much time from my medical practice which I needed to spend time and I felt I needed some expertise to help manage that and to look into these and spend the time that I didn't have time to spend.

Q. Do you recall what contact you had with representatives [p. 2-83] of BancBoston prior to Mr. Mifflin's being retained?

A. Only on one occasion and that was when we signed the documents for the construction loan was the only person – the only time I ever met any representative of Bank of Boston, and that was a fellow who runs the local office. I don't remember his name. I first met Mr. Hudspeth when there was a – the project was completed and there was an opening night or a gala, he came up and introduced himself, which was my first introduction to him. Otherwise, I had no dealings at all with any of those people, either in person or in meetings. I never received correspondence, phone calls. It was all through Mr. Ledford.

MR. JENNINGS: I believe that's all right now, Your Honor.

THE COURT: Mr. Hancock, any questions?

MR. HANCOCK: No questions.

THE COURT: Mr. Davidson.

REDIRECT EXAMINATION

BY MR. DAVIDSON:

Q. Dr. Sikes, in these weekly or bi-weekly discussions with Mr. Ledford, you discussed the Montclair project?

A. That and also other projects.

Q. Did you have access to the files at Ledford Properties?

A. I'm sure if I had asked for them, I would have had access. I had no reason to ask for them.

Montclair

16 contracts out of 42 units
5 have outs – free option until May
11 don't – 7% of purchase price earnest money

Will get package & agreement
$6,225,000 total cost — Can Not Sell

Mrs. Sonnenfield is 88 years old

Model open in May

Ledford says he is not to secure ½ FANB
Note – Will clear w/Greg.

No Park Circle connection – 10 unit sale
has been accomplished

Completion – West End – Fredrich of Hooper

Sunset

Ledford says financing
⅓ of 20% once capital is restored
Capital probably will be restored in 90 days
90-10 split cash flow
80-20 – resale (Back end)

329 Union

Valued at what he has in it — Probably Can Not Sell

App. 18

Meeting 2/27/87

Montclair

The West End across the street – direct competitor – price same

16 Contracts in hand out of 42 units

5 can get out, have until May	11 can't – firm – owner/occupant Has cash or letters of credit averaging 7%

2 investor units for 140,000
142,000
144,900
149,900 – lowest price now
159,900 –
239,900 – 3rd floor corner

6,225,000 total cost

House & Lot – 5 to 6 townhomes could be built
Occupant is 88 yrs. old
Value – 8,200 sq. ft. to build
185,000 (would ask 200,000)

Greg should net 480,000

Model open in May
Everything ready for occupancy – July.